IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

OPPOSITION TO MOTION OF SAMUEL E. PARKER AND LYLA E. PARKER FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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On September 26, 1978, the undersigned counsel for petitioner The Great Atlantic & Pacific Tea Company, Inc. ("A&P") received a "Motion of Samuel E. Parker and Lyla E. Parker For Leave to File a Brief Amicus Curiae and Brief as Amicus Curiae". A&P opposes this motion on several grounds.

First, the motion is untimely. According to this Court's Rule 42(3), a motion for leave to file an *amicus curiae* brief "may timely be presented to the court". While "timely" is not defined, the leading treatise in this field notes that "timely" means "in time to permit the filing of a brief on the merits within the time specified" in Rule 42(2), which is "the time allowed for the filing of the brief of the party supported". Stern & Gressman, *Supreme Court Practice,* § 13.13 at 726 (5th ed. 1978). Here, the brief of the Federal Trade Commission ("FTC"), pursu-

ant to an extension of time granted by the Clerk of the Court, was due on August 5, 1978.* Counsel for the movants (the "Parkers") had been advised months prior to that date that A&P would not consent to their filing an *amicus* brief in this case, but they did not submit the instant motion until almost seven weeks thereafter—without any attempt to justify their untimeliness.

In addition, the Parkers' "interest" is far too narrow to permit their participation here.** Their motion is essentially an attempt to capitalize on the FTC's decision against A&P (which the Parkers assert will be *prima facie* "evidence of almost every element of proof necessary to establish the liability of A&P" for damages) and to obtain an assist from this Court on the issue of the measure of damages to be applied in their private action under § 2(f) —a subject extensively addressed in their proposed brief but not relevant here.

If it were to be injected into this case, the issue of damages would needlessly complicate these proceedings. For example, A&P would be required to show that Exhibit A to the Parkers' brief, which allegedly compares Borden's prices to A&P with the lowest prices given to non-A&P customers of Borden, does nothing of the sort.***

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* In fact, A&P did not receive the FTC's brief until September 5, 1978.

** Plaintiffs' class action claim has been rejected as "manifestly ill-suited to class action treatment". *Parker* v. *The Great Atl. & Pac. Tea Co.*, No. 71-C-3075, slip op. at 4 (N.D.Ill., Aug. 9, 1978). Thus, despite frequent references in their motion and brief to "other independent grocers", the plaintiffs represent only themselves as former owners of a retail grocery store in Chicago.

*** The prices listed for the non-A&P stores on Exhibit A were taken from general price lists and discount schedules allegedly disseminated by Borden. They are not net prices, and do not reflect any of the special discounts and allowances which were almost

Finally, the other responsive arguments raised by the Parkers (*e.g.*, regarding the goals of the Robinson-Patman Act, and A&P's good faith) have, we submit, been adequately presented by the Solicitor General.*

For all of the above reasons, the Parkers' motion should be denied.

Dated: New York, New York
September 29, 1978

Respectfully submitted,

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universal in the dairy industry. Nor was any proof presented at the hearing that those prices were actually charged to *any* customer of Borden. Furthermore, Exhibit A ignores the differences in the services received by A&P and the non-A&P stores.

* One argument raised by the Parkers, but not by the FTC, is the allegation that by "agreement between A&P and Borden", A&P did not lower the retail price for the private label milk it received from Borden. That claim was disposed of by the Commission when it dismissed Count III of the original FTC complaint against A&P. The Commission ruled that "the record contains no evidence suggesting that Borden and A&P discussed the price A&P would charge retail customers" and that the evidence presented does not "in any way convince us that A&P ever gave Borden the assurance that A&P would not create a price differential at the retail level" (87 F.T.C. 1047, 1066).